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No. 06-1193

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

CHRISTOPHER M. GAMBLA,

Petitioner,

v.

KIMBERLY K. WOODSON,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does a court's use of race as the basis for determining child custody violate the Equal Protection Clause of the Fourteenth Amendment?

2. Does a court's consideration of race as a factor in child custody determinations violate the Equal Protection Clause of the Fourteenth Amendment?

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STATEMENT OF THE CASE

This brief is filed in reply to the Respondent's brief in opposition.

The Petitioner stands on his Statement of the Case in the petition for writ of certiorari, and in reply to the Respondent's statements, provides the following additional information.

There is no dispute between the parties that the issue of race was raised by the Respondent in the Trial Court, that the child's and parents' race was considered by the Trial Court in determining custody, that prior to considering race as a factor in determining custody the parties were held equal or "roughly equal" by the Trial Court as to all other factors, and that the issue of race was the determinative factor, or "tipping point", in awarding custody.

The parties' dispute whether the Appellate Court opinion in this case conflicts with this Court's decision in *Palmore v. Sidoti*, 466 U.S. 429 (1984), and whether there is a split among the state courts of last resort in their interpretation of *Palmore*.

The Petitioner also disputes and clarifies the following.

1) The Respondent sets forth, "On May 13, 2003, Christopher Gambla filed for divorce from Kimberly Woodson after one year of marriage." Respondent's brief in opposition p. 4. In fact, each of the party's attorneys filed petitions for dissolution of marriage on their behalf, and Mr. Gambla's petition was filed *the day before* Ms.

Woodson's (R. C0001 and C0815). Ms. Woodson's petition was thereafter consolidated with Mr. Gambla's petition.

2) The Respondent sets forth, "Ms. Woodson had one child from a previous marriage - a six-year old son named Che Woodson." Respondent's brief in opposition p. 4. Ms. Woodson was never married to her son's father.

3) The Respondent sets forth, "As for Kira's half-brother, Che, Arl[i]ne noted:" Respondent's brief in opposition p. 4. The quotations attributed to that statement were made by Ms. Woodson's sister, Linda, and not Mr. Gambla's mother, Arline.

4) The Respondent sets forth, "At trial, two experts recommended that Gambla be awarded sole custody of Kira, at least in part on the basis that Kimberly had (at the time) petitioned for removal of Kira to her home state of North Carolina." Respondent's brief in opposition p. 4. This statement contradicts the evidence at trial. The Trial Court itself asked Dr. Hynan, "Dr. Hynan, would your opinion relative to custody be any different had removal not been an area that you looked into at the time that you did your evaluation?" Dr. Hynan answered, "It would not be any different." (R. C1541). Similarly, Mr. Gambla's attorney asked Dr. Hatcher, "Did your opinion rest in any part on the issue of removal?" Dr. Hatcher answered, "No. The issue had been settled." (R. C1743).

5) The Respondent sets forth, "However, finding that their [Drs. Hynan's and Hatcher's] conclusions were based largely on the pendency of a petition to remove Kira to North Carolina, the trial court determined that given the subsequent withdrawal of this petition, these conclusions carried less weight." Respondent's brief in opposition p. 6. The record clearly indicates that this

determination by the Trial Court was incorrect (see testimony in number 4 above). As stated by the Appellate Court dissent, "This testimony alone illustrates that the trial court's ultimate custody decision was mistaken, when reviewed under the clearly erroneous standard, because the court incorrectly weighed the testimony by incorrectly factoring nonexistent impeachment of the reasons for the doctors' custody opinions." Pet. Appendix p. 55a. Considering that the Trial Court determined that the case was exceedingly close and improperly discounted the doctors' opinions, it logically follows that a different result would have occurred. This is even more evident if race is an unconstitutional consideration.

6) The Respondent sets forth, "The court noted, *inter alia*, that Kira appeared to love both of her parents and to be 'happy spending time with each of them,' and furthermore that Kira had a 'loving relationship with her [step]brother Che.'" Respondent's brief in opposition p. 6. It is noteworthy that the Trial Court also found that Kira "has a loving appropriate, relationship with her cousins with whom she lives when she spends time with the Petitioner. In addition, there is no indication that she has anything other than a loving relationship with her grand parents, her aunts and uncles and all other family members with whom she comes in contact. In short, she is a loving child who loves her relatives in addition to her parents and who, by all accounts, is loved by each of them as well." Pet. Appendix p. 66a. In accordance with the Judgment of Dissolution of Marriage, and although Ms. Woodson was awarded sole custody of Kira, the parties continue to share her physical custody on a 50/50 basis until her enrollment in school.

7) The Respondent sets forth, "As the Appellate Court observed, Petitioner conceded *at trial* that 'race

may be considered.'" (emphasis added). Respondent's brief in opposition p. 10. The Respondent similarly sets forth, "the narrower question of whether race can be considered at all was conceded away by the Petitioner *in the trial court below*" (emphasis added). Respondent's brief in opposition p. 15. These are not factual statements. The Petitioner did not concede in the Trial Court that race may be considered. In fact, the Petitioner strenuously objected on no less than two occasions in the Trial Court to the introduction of race into the proceedings. Pet. pp. 5-7. The Petitioner conceded *during oral arguments at the Appellate Court* that Illinois case law allowed the consideration of race in child custody determinations so long as it was not the determinative factor in the decision ("race alone cannot outweigh all other considerations and be decisive of the question of custody"), *Fountaine v. Fountaine*, 9 Ill.App.2d 482, 133 N.E.2d 532 (1956); *Langin v. Langin*, 2 Ill.App.3d 544, 276 N.E.2d 822 (1971); and *Russell v. Russell*, 80 Ill.App.3d 41, 399 N.E.2d 212, 35 Ill.Dec. 378 (1979). Mr. Gambla went on, however, to argue based on *Palmore* that he disagreed with this state case law and any consideration of race by the courts in determining custody. Mr. Gambla made specific oral and written arguments at the Appellate Court to that effect.

REASONS FOR GRANTING THE WRIT

The Petitioner stands on his Reasons for Granting the Writ in the petition for writ of certiorari, and in reply to the Respondent's arguments, provides the following.

A. The Illinois Appellate Court Decision Conflicts With The Position Of The United States Solicitor General

The Respondent argues, "the court's measured approach reveals that racial or cultural considerations are a factor of *last resort* rather than first opportunity to be reached only after other statutory factors are deemed to be roughly equal. As a matter of pure probability, with eight statutory factors to consider, the likelihood of race coming into play repeatedly (at least as the Illinois court considered it here) appears small." Respondent's brief in opposition p. 9. The Respondent further argues, "And if race may be considered, then it may on occasion be the tipping point and that is all that this case is about." Respondent's brief in opposition p. 10.

In its amicus curiae brief for the petitioner in *Palmore v. Sidoti*, 466 U.S. 429 (1984), the United States Solicitor General would seem to disagree with the Respondent, and even predicted the scenario (as in the instant case) where race is necessarily converted into the decisive factor after the parties are held equal as to all other factors. That brief states,

> In addition to Florida, one other state allows consideration of a subsequent interracial marriage so long as race is not treated as the "controlling" factor in custody determinations. /6/ *Russell v. Russell*, 80 Ill.App.3d 41, 43, 399 N.E.2d 212, 215 (1979) (permissible for trial court to acknowledge potential social pressures attributable to interracial marriage so long as race alone is not the decisive factor);

> *Langin v. Langin*, 2 Ill.App.3d 544, 547, 276 N.E.2d 822, 824 (1971) (quoting *Fountaine v. Fountaine*, 9 Ill.App.2d 482, 486, 133 N.E.2d 532, 535 (1956)) ("'race alone cannot outweigh all other considerations and be decisive of the question (of custody)'"). /7/ It is our view that these decisions are erroneous. Once race is held to be a "relevant" consideration, it is virtually impossible to prevent it from becoming the "controlling" consideration in any particular case. If, for example, the natural parents are each found equally fit, then consideration [of race or] of one parent's subsequent interracial marriage necessarily will be converted into the decisive factor. Moreover, even if it could be confined to "relevant" rather than controlling status, considering race at all in the custody decision would be unconstitutional. As one court has recognized, "(t)he very act of considering race as a factor, and then disregarding it as a controlling factor, requires that the state admit contrary to the Constitution, that there are differences in human beings because of their color." *DeLander v. DeLander*, 37 U.S.L.W. 2139 (Cal. Super. Ct. Aug. 14, 1968). /8/ We therefore submit that race should be altogether stricken from consideration in change-of-custody proceedings. (emphasis added)

Therefore, the consideration of race in any manner in child custody determinations conflicts with this Court's

decision in *Palmore* and the position of the United States Solicitor General.

CONCLUSION

For the foregoing reasons, Mr. Gambla respectfully requests the Court to grant his petition for writ of certiorari.

Respectfully submitted,

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